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State Commission
on Judicial Conduct

ID# 11967
SE

RQ-48

March 1, 1991

RECEIVED

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Opinion Committee

Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
P. O. Box 12548
Austin, Texas 78711-2548

Re: Is a constitutional county
judge disqualified from presiding
over probate proceedings involving
wills previously prepared or
witnessed by the judge?

Dear General Morales:

There are sparsely populated counties in Texas that have a very small number of lawyers. In some of these counties the county judge is the one who presides over probate matters and also one of the few attorneys in the county. The likelihood is that a county judge in these circumstances will have wills that he has prepared offered for probate in his court.

It would be most helpful to the Commission and to the Texas Constitutional County Judges who are licensed attorneys practicing law (even in populous counties) for you to issue an opinion concerning several variations of the basic problem. Specifically, may constitutional county judges, who are also licensed to practice law, preside over probate proceedings:

- 1) when the will offered for probate was prepared by the judge for a deceased client prior to the time the judge assumed the bench?

- 2) when the will offered for probate was prepared by the judge for a deceased client after the judge assumed the bench?
- 3) when the will offered for probate was prepared by an attorney related to the judge by affinity or consanguinity within the third degree?
- 4) when the will offered for probate was prepared by an attorney with whom the judge is, or was, engaged in the practice of law?
- 5) when the will offered for probate was prepared by another attorney but witnessed by the judge either prior to or after assuming the bench?

Additionally, we request your consideration whether or not circumstances relating to any specific will being self proven or uncontested would be relevant in reaching answers to the above questions.

The Commission has considered the language of the Texas Constitution, Article 5, Section 11:

No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case.

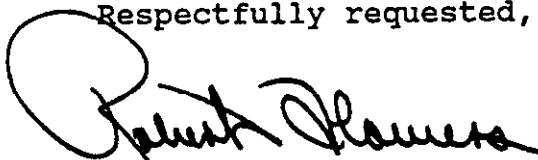
The Commission also believes that Texas Rules of Civil Procedure Rule 18b may be relevant in stating:

- (1) Disqualification. Judges shall disqualify themselves in all proceedings in which:
 - (a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

Honorable Dan Morales
Page 3

- (b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or
- (c) either of the parties may be related to them by affinity or consanguinity within the third degree.

Respectfully requested,

A handwritten signature in black ink, appearing to read "Robert Flowers", written over a large, loopy circular mark.

Robert Flowers
Executive Director

RF:sn